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514822—59——1

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 145

WILLIAM GIGLIO AND FRANK LIVORSI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 41–46) is reported at 263 F. 2d 410.

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1959, and a petition for rehearing was denied on April 1, 1959. The petition for a writ of certiorari was filed on June 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly denied an application for relief under 28 U.S.C. 2255 on the

basis of a hearing which satisfied it that the affidavit supporting the application was false.

STATEMENT

In 1955, the petitioners and one Lawn were convicted in the United States District Court for the Southern District of New York on an indictment charging violations of Sections 145(b) and 3793(b) of the Internal Revenue Code of 1939 and of the general conspiracy statute, 18 U.S.C. 371. Giglio was convicted on eight counts of the ten-count indictment and Livorsi on four counts. Each received prison sentences aggregating fifteen years. The convictions were affirmed by the Court of Appeals. *United States* v. *Giglio*, 232 F. 2d 589. This Court, after reviewing the case on the merits, unanimously affirmed the petitioners' convictions.[1] *Lawn* v. *United States*, 355 U.S. 339. Petitions for rehearing were denied on March 3, 1958. (355 U.S. 967.)

On March 14, 1958, former Assistant United States Attorney Gerome J. Leone, who had been in charge of the case for the United States Attorney's office between 1951 and May, 1953, signed an affidavit (AA 2777–2779[2]) the effect of which, if true, would be to

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[1] Three justices dissented with respect to the conviction of Lawn, who is not a party to the present proceeding.

[2] The appellants' appendix in the Court of Appeals, consisting of one volume with pages numbered 2761 through 2966, is designated "AA". The Government's appendix in the Court of Appeals, consisting of one volume with pages numbered 1a through 152a, is designated "GA". The record (including a transcript of the proceedings at the trial) filed in this Court in *Lawn* v. *United States* and *Giglio* and *Livorsi* v. *United*

indicate that at the trial the Government had used certain evidence derived from partnership records which had been ordered suppressed on the ground that they were obtained in violation of the petitioners' constitutional rights. *United States* v. *Lawn*, 115 F. Supp. 674.[3] The crucial part of Leone's affidavit, *i.e.*, the only part upon which the petitioners now rely (Pet. 9, 11), reads as follows (AA. 2778):

> Included in that examination [of Leone by petitioners' attorneys in March, 1958] were questions relating to two particular items which, to my knowledge, were subjects of the indictment and the several counts therein, specifically these items included the closing inventory of a partnership of two of the defendants herein, said partnership being known as Tavern Fruit Juice Company. It is my recollection that the Government had no knowledge of the closing inventory, which inventory, to the best of my recollection, was approximately $60,000 or $70,000. It was only after the defendants produced the books and records that we were able to determine that such an inventory existed

---

States, Nos. 9 and 10, October Term, 1957, consisting of four volumes with pages numbered 1 through 3003, is designated "R". The Government's brief on the merits in *Lawn* v. *United States*, No. 9, October Term, 1957, is designated "Govt. Br. L.".

[3] The Government's appeal from this order was dismissed as not having been filed in time. *United States* v. *Roth*, 208 F. 2d 467. The dismissal of the Government's appeal rendered *res judicata* the issue of whether the petitioners' constitutional rights had been violated. In affirming the convictions in 1956, the Second Circuit pointed out that "the legal problem is still open before us." *United States* v. *Giglio*, 232 F. 2d 589, 594, fn. 3.

and that said inventory was excluded from any tax returns by the defendants.

Another item concerning which I was questioned was an item of some thirty thousands of dollars for research expended by Tavern Fruit Juice Company. Concerning this item, involving a person known as Goldenberg or Gordon, to the best of my recollection, the Government had no knowledge prior to the production of the aforementioned books and records. It is my best recollection that this item was deduced from cancelled checks which had been produced by the defendants herein or some of them.

On March 17, 1958, the petitioners moved to vacate the judgments, alleging, on the basis of Leone's affidavit, that their constitutional rights had been violated "in that the Government used documentary and other evidence, and leads and clues obtained therefrom, at the trial" in violation of the suppression order. (AA. 2765.) The Government filed answering affidavits by Government attorneys and Treasury agents, together with documentary evidence, tending to show that Leone's affidavit could not be true. (GA. 1a–124a.) The court granted the application "to the extent that a hearing is hereby set down for May 6th, 1958, at which defendants' first witness shall be Gerome J. Leone." (AA. 2781.) At the conclusion of Leone's direct examination the Government moved "to dismiss the proceedings on the very testimony of this witness." (AA. 2939.) Briefs were submitted and the Government's motion was granted. (AA. 2793–2794, 2955.) The court observed that it had granted the hearing in order to give "Leone an opportunity to

either fish or cut bait on the statements that were made by him in the affidavit * * *" (AA. 2954); that in Leone's testimony "he actually says nothing—n-o-t-h-i-n-g" (AA. 2946); and that "I didn't feel that I could place any credence whatsoever in the testimony of the witness Leone" (AA. 2961). The Court of Appeals affirmed. *United States* v. *Giglio*, 263 F. 2d 410.

The history of this case may be summarized briefly as follows:

In July, 1953 the present indictment was filed. Thereafter the petitioners moved to dismiss the indictment and to suppress "tainted" evidence. In this connection, they requested inspection of the 1953 grand jury minutes and a hearing to ascertain whether any of the "tainted" evidence was used directly or indirectly to obtain the indictment. (Govt. Br. L. 34.) As a part of its response, the Government filed affidavits by all Treasury agents and Government attorneys who had been connected with the case, certifying that in securing the indictment no use, direct or indirect, had been made of testimony given or partnership documents produced before the 1952 grand juries by the defendants. (R. 67–109.) Leone's affidavit, dated August 31, 1954, stated in part (R. 104):[4]

> Under these circumstances, the 1953 indictment was to be based solely and entirely upon

[4] Leone, meanwhile, had resigned his Government position during the summer of 1953, a few weeks after indictment was obtained. (R. 102, 2118.) Leone was one of the two Government attorneys who presented the case to the 1953 grand jury. (R. 103, 106, 2832, 2839.).

evidence obtained without reference in any way to the disclosures made by defendants either in partnership documents or in testimony to the 1952 Grand Juries. I instructed and directed the Special Agents and the Revenue Agent to use no evidence or leads and clues so obtained in any way, either before the Grand Jury, at trial, or otherwise in this prosecution. In discussing the 1953 indictment, we went over *every charge* and *all proof* and I was assured by the agents that nothing remained which could in any way *be even remotely related to defendants' testimony or partnership documents.*

I believe that the agents followed my directions. I know of no evidence presented to the 1953 Grand Jury which was obtained in any way, however remote, from defendants' testimony or production of partnership documents to the 1952 Grand Juries. [Emphasis added.]

The motions to dismiss and to suppress were denied, the court stating "Of course, if during the course of the trial defendants have reason to believe that illegally obtained material is being or may be used against them, they can object at that time and it will be incumbent upon the trial judge to rule on their objections." (R. 183.)

At the trial petitioners frequently availed themselves of the opportunity to inquire as to the dates and circumstances under which the Government's evidence was obtained. (E. g., R. 1628–1634, 1657–1658, 1662, 1732–1733, 1738–1740, 1744–1745, 1751–1752, 1758, 1928–1945, 2030–2032, 2034–2036, 2044–2046,

2048.) Leone testified as the first witness for the defense. (R. 2116–2139.)

The Second Circuit affirmed the convictions, holding there (232 F. 2d 589, 595), as well as in its opinion in the instant case (263 F. 2d 410, 412), that there was "nothing in the record of trial suggesting any use of illegal clues" and that as to the "so-called 'tainted' evidence" that "appellants had a right of full cross-examination during the trial as to the sources of government exhibits and that they exercised this right on a number of occasions".

This Court unanimously affirmed the convictions,[5] stating (355 U.S. at 355):

> Petitioners argue that they were denied an opportunity to examine and cross-examine witnesses at the trial to determine whether evidence derived from leads and clues furnished by materials obtained from them in the 1952 grand jury proceedings was used by the prosecution at the trial, and that this deprived them of due process in violation of the Fifth Amendment. * * * The contention is wholly factual, and a thorough study of the record discloses that petitioners were accorded that right. The court did not sustain objections to petitioners' examination or cross-examination of witnesses attempting to show derivative use at the trial of any evidence produced by petitioners before the 1952 grand jury, but only sustained objections to questions attacking the procedural validity of the indictment. * * *

[5] I.e., the convictions of the two present petitioners. See fn. 1, *supra*, p. 2.

This Court concluded its discussion of this contention as follows (255 U.S. at 357–358):

> Third, petitioners argue that in examining their own witness, former Assistant United States Attorney Leone, they were denied an opportunity to show derivative use of tainted evidence by the Government at the trial. The record shows that there is no basis whatever for this contention.

ARGUMENT

The petitioners' sole contention, that the District Court erred in terminating the hearing at the conclusion of the direct examination of Leone, is wholly without substance. It rests, of necessity, on Leone's affidavit and his testimony at the hearing; no other new matters had been injected into this case since it was reviewed on the merits by this Court.

Preliminarily, it may be noted that the petitioners proffer no excuse for their failure to question Leone at the trial of the case about the two items in question (Tavern's closing inventory and research expenditures).[6] He was their witness, and presumably his recollection of the pertinent events was better in 1955

[6] The petitioners do suggest (Pet. 21) that they could have learned about these items from Leone at the trial only "had Leone volunteered the information". This is plainly incorrect. This Court has found that the petitioners were accorded the right to put such questions at the trial. (*Supra*, pp. 7–8.) Nor can it be said that defense counsel did not know which items to question Leone about. These two Tavern items—the only fraud items alleged with respect to Tavern—stood out in sharp relief in the Government's proof and in the bill of particulars. (R. 23, 2939–2940.)

than it was in 1958. Clearly, they should not be permitted—on the basis of information which they presumably could have had for the asking at the trial—now to reopen this case to urge anew an issue which already had been thoroughly litigated.

Apart from this consideration, however, the petitioners are not entitled to the relief sought. The key problem which the District Court had to resolve was the question of Leone's credibility. Finding himself unable to "place any credence whatsoever in the testimony of the witness Leone" (AA. 2961),[7] and concluding that even if that testimony were credible it would be meaningless (AA. 2946), the district judge quite properly terminated the hearing at the close of Leone's direct examination. His conclusion that Leone was unworthy of belief is clearly supported, since Leone's affidavit is in direct conflict with (1) the record of the trial; (2) Leone's 1954 affidavit which was filed in this case; and (3) Leone's testimony at the hearing on the instant motion.[8]

(1) *The record of the trial.*—The Tavern closing inventory ($72,321.17) was reconstructed by Agent Present from the Tavern accounts receivable-accounts payable ledger, which was obtained by the agents from the New Jersey receiver on June 20, 1949,

[7] Despite this express finding, the petitioners rely heavily upon Leone's testimony at the hearing.

[8] It might be noted that the subject of Leone's affidavit, i.e., the two Tavern fraud items, has a bearing on three of the eight counts on which Giglio was convicted (Counts 2, 5 and 10) and two of the four counts on which Livorsi was convicted (Counts 6 and 10). (See Govt. Br. I. 4; R. 10-21, 2939, 2943-2944.)

three years before the disputed grand jury proceedings. (R. 1875–1881, 1935–1937, 2031, 2082, 2939–2940; Deft's Ex. LLL-reproduced at GA. 43a.) [9] It was apparent from the entries in this ledger that a closing inventory existed, because Tavern ceased making sales on November 23, 1945, but continued to purchase raw materials after that date. (R. 1875.) [10] Moreover, the books of the American Brands Corporation (also obtained by the agents in 1949) which took over Tavern's business on January 8, 1946, showed merchandise sales in excess of $72,000 during the first few days of its existence, before its books showed any purchases. (R. 1877–1878, 1934–1937.) With the Tavern partnership making purchases but no sales late in 1945, and its successor corporation making sales but no purchases early in 1946 (eight days after the termination of the excess-profits tax—R. 1878), it was evident that Tavern had had on hand a closing inventory which should have been reported on its final return. In fact, defense counsel, in cross-examining Treasury Agent Present at the trial, elicited testimony as to the dates when the Government learned of the closing inventory item. (Fn. 11, *infra*; R. 1935–1937, 2034–2037, 2082.) The statement in Leone's affidavit to the effect that "the Government had no

[9] The Tavern accounts receivable-accounts payable ledger was maintained by the accountant, Roth, as a single book. (R. 1013, 1197, 1205–1207, 1249, 1924, 1937.)

[10] The sales and purchases reported in the partnership return tied in with the accounts receivable-accounts payable ledger, but the cost of goods sold shown on the return was not reduced by the value of the closing inventory. (R. 1876–1877.) The result was an understatement of $72,321.17 in the net income reported by Tavern, half of which was taxable to each of the petitioners. (R. 1875, 2939–2941.)

knowledge of the closing inventory" until "after the defendants produced the books and records" in 1952 (AA. 2778) is thus patently untrue.[11]

The other item on which the petitioners rely, the Tavern research expenditures, consists of a deduction as a partnership expense of $32,780.93 ostensibly paid to one Gordon (also known as Goldenberg) as salary. (R. 993–996, 1884–1886, 2939.) Contrary to the statement in Leone's affidavit—that the "Government had no knowledge [of the Gordon item] prior to the production of the * * * books and records" in 1952 (AA. 2778)—the record shows that in the course of their investigation of the petitioners the Treasury agents did question Gordon in 1950 as to what he had been "doing as an engineer" for Tavern in 1945. (R. 1563–1564.)[12] At the trial, counsel for the petitioners

[11] The basic proof of the closing inventory at the trial consisted of the testimony and records of the vendors who had sold raw materials to Tavern after November 23, 1945. (R. 1605–1662, 1879–1881.) The names of those vendors were, of course, shown in the Tavern ledger. (R. 1876–1877, 2082.) Defense counsel made full inquiry as to when that ledger came into the Government's hands, and did not dispute the proof that the date was June 20, 1949. (R. 1935–1937, 2031, 2034–2037; Deft's. Ex. LLL—reproduced at GA. 43a.) When defense counsel inquired of the representative of the Nulomoline Company (whose sales to Tavern accounted for almost half the closing inventory) as to when it had first turned over to the Government its records of the sales, that witness replied that it was on May 17, 1950. (R. 1657–1658.)

[12] Roth, acting under the instructions of Petitioner Giglio, padded various expense accounts to the extent of $2,000 or $2,500 weekly, to account for checks cashed for petitioners' personal benefit. The research expense ostensibly paid as salary to Gordon was one of these expense accounts, the only one expressly singled out as fraudulent. (Govt. Br. L. 13–14; R. 993–996, 1009–1011, 1014, 1071–1072.)

had the opportunity of questioning Treasury Agent Present as to when he had learned of the research expenditures item, but failed to do so.

(2) *Leone's 1954 affidavit.*—As we have said (*supra*, pp. 5–6), Leone filed an affidavit in this case, dated August 31, 1954, in connection with petitioners' motions to dismiss the indictment and to suppress evidence, in which he assured the District Court (R. 104):

> In discussing the 1953 indictment, we [Leone and the Treasury agents] went over *every charge* and *all proof* and I was assured by the agents that nothing remained which could in any way *be even remotely related to defendants' testimony or partnership documents.*
>
> I believe that the agents followed my directions. I know of no evidence presented to the 1953 Grand Jury which was obtained in any way, however remote, from defendants' testimony or production of partnership documents to the 1952 Grand Juries. [Emphasis added.]

"Every charge" and "all proof" necessarily includes the Tavern closing inventory and the Tavern research expenditures, for they constitute the only fraud items involved in Count 2 of the indictment. (R. 10–11, 23.) [13] No argument is needed to demonstrate that Leone's 1954 affidavit is in direct conflict with his 1958 affidavit (*supra*, pp. 2–4), where he alleged

[13] The closing inventory and research expenditures items also have a bearing on the conspiracy count (Count 10) and the counts charging petitioners with the willful attempted evasion of their individual income taxes. (Counts 5 and 6). (R. 13–14, 18, 19, 23–24.)

that the Government's knowledge of these two items was acquired from the partnership books and records produced by petitioners.

(3) *Leone's testimony at the hearing.*—Leone's testimony not only fails to support his affidavit, but directly contradicts it. On the first day of the hearing Leone stated, contrary to his affidavit (*supra*, pp. 2–3), that prior to the 1952 grand jury proceedings "*We had knowledge* of a closing inventory. But what happened to it, I say we didn't know." (AA. 2873; emphasis added.) He went on to explain that, after the grand jury proceedings, Agent Present had shown him a piece of paper, possibly a warehouse invoice for storage charges, which disclosed for the time the *exact location* of the inventory. (AA. 2874–2876.)[14] Leone did not know whether that document had been produced by the petitioners. (AA. 2932.) With respect to the research expenditures (*supra*, p. 4), Leone testified that before 1952, "*we had knowledge* of the deduction" (AA. 2883); that "we knew that the deduction had been taken but we did not know why or how" (AA. 2881); that Gordon had been a bootlegger and "not a man that you would expect to do an engineering process, or a research process" (AA. 2885); that the first "*corroboration* we had", however, came from the Tavern canceled checks produced by petitioners in 1952 (AA. 2884), which showed that Gordon had cashed Tavern checks for large sums (AA. 2885).

[14] The geographical location of the inventory was, of course, irrelevant to the Government's case. The important facts were that it was in existence, belonged initially to Tavern, and was sold by American Brands Corporation. (*Supra*, p. 10.)

(Emphasis added.) When the court asked how such checks would be useful as proof, Leone replied, "Judge, I don't recall." (AA. 2887.)

Early on the second day of the hearing Leone acknowledged that he had never read the affidavits filed by Government attorneys and agents in answer to his affidavit. (AA. 2850, 2906, 2908.) After having read them (AA. 2929), he attempted to reconcile them with his own affidavit by answers (AA. 2931–2936) and by a conclusory statement in language strongly suggesting the disintegration of his own position (AA. 2937):

> There are certain things, looking at these affidavits, everything in my affidavit is true, to start with. But in looking at these affidavits, and in recalling some of the things that are contained herein, I feel that a different interpretation could be put on my own affidavit other than I meant to put on it first of all and other than what the facts really are.

In the circumstances, there was no need for the court to continue the hearing, since the allegations of Leone's 1958 affidavit—the factor which motivated the granting of the hearing—were clearly shown to be false by the trial record, by their direct conflict with Leone's 1954 affidavit, and by Leone's oral repudiation of them at the hearing.

The cases relied upon by the petitioners (Pet. 21–24, 28–35) are not apposite here. In each of them there was some credible basis for affording relief—some reasonable chance that the petitioner, given the opportunity, might be able to establish by credible evidence that there was merit in his contention. In

the case at bar, however, the entire foundation for the motion evaporated when it became clear that Leone's affidavit was false.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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PETITIONER'S BRIEF ON THE MERITS

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OCTOBER TERM, 1959

WILLIAM GIGLIO and FRANK LIVORSI,

Petitioners,

against

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 145

WILLIAM GIGLIO and FRANK LIVORSI,

Petitioners,

against

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF

The Government concedes (Br., pp. 2-3) that the effect of Leone's post-conviction affidavit, "if true," would be to indicate that tainted evidence was used against the defendants at the trial. It follows from this admission that the defendants were entitled to a plenary hearing in the District Court. The issue of whether Leone's affidavit was true or false should have been decided after a full hearing and not in the peremptory manner employed below.

The Government seeks to justify the refusal of a plenary hearing on two grounds, namely (1) that Leone's affidavit, in fact, was not true, and (2) that the defendants could have elicited the information earlier but failed to do so. We shall consider these matters in inverse order.

I

The doctrine of *Price* v. *Johnston*, 334 U. S. 266 (1948), referred to in our main brief (pp. 22-24), disposes of the second ground since, under the principle of that case, the petitioners were entitled to be heard on the issue of

whether or not the information they had acquired was "new" (334 U. S. at p. 291). There is no proof here that the petitioners had prior knowledge of the facts concerning their present claim, but even if they had, they were entitled to a hearing to afford them an opportunity to present adequate reasons for not making the allegations earlier (*Id.* at p. 291). The burden was not on the petitioners to affirmatively allege, in the first instance, that they had acquired new information or that they had adequate reasons for not raising the issue sooner (*Id.* at pp. 291-292).

It is significant that the Government does not contend here that *Price* v. *Johnston*, which involved successive applications for writs of habeas corpus, is inapplicable to the present proceedings under Title 28 U.S.C. § 2255. The Government's failure to discuss the applicability of the *Price* doctrine constitutes a tacit admission that no rational distinction exists between the two cases.

II

The Government predicates its contention that Leone's affidavit is false upon (1) the record of the trial; (2) Leone's 1954 affidavit; and (3) Leone's testimony at the abortive hearing below.

1. The Government claims that the record of the trial demonstrates an untainted source of the evidence concerning the Tavern inventory, consisting of books which had been obtained by the Treasury agents before the disputed grand jury proceedings took place. However, Tavern's accounts receivable—accounts payable ledger, merely revealed to the Government that Tavern had ceased making sales on November 23, 1945 but continued to purchase raw materials after that date, while the books of American Brands Corporation, which took over Tavern's business on January 8, 1946, showed merchandise sales in excess of $72,000.00, during the first few days of its existence, before the recording of any purchases.

What the Government may have ascertained from untainted sources, therefore, fell far short of establishing the falsity of the Tavern return. It was incumbent upon the Government not only to establish that Tavern had an inventory when it ceased business and that the inventory was taken over by American Brands Corporation when it commenced business, but it was vital that the Government establish, as well, that this inventory was involved in a fraudulent scheme or device relating to Tavern's tax return.

The mere existence of an inventory of merchandise at the termination of Tavern's business and the appearance of that inventory in the possession of American Brands Corporation, when it commenced business, did not establish a fraudulent return on Tavern's part. For example, the Tavern inventory, upon the termination of its business, may have been charged to the partners' drawing account and withdrawn by the partners, later to be contributed by them to American Brands Corporation, either as capital or as an advance. The defendants have urged, both in the Court of Appeals and in their petition here (Br., p. 37) without contradiction by the Government, that the latter hypothesis was a possible innocent alternative to the theory which the Government finally advanced at the trial, namely, that Tavern's closing inventory actually was charged as part of the cost of goods sold on its tax return and that, therefore, its omission as an asset resulted in an understatement of its income. It was only through the use of tainted evidence that the Government was able, at the trial, to contend that there was a fraudulent concealment of the Tavern inventory.

With respect to the Tavern research expenditures, consisting of a deduction for payments made to Gordon (or Goldenberg), the Government contends (Br., p. 11) that the record of the trial shows that in the course of the investigation of the petitioners, the Treasury agents questioned Gordon in 1950, prior to the date of the disputed

grand jury proceedings, as to "what he had been 'doing as an engineer' for Tavern in 1945."

This contention is in complete accord with Leone's testimony. He stated that Twohig, one of Treasury agents, had questioned Gordon prior to the time that the tainted evidence had been produced by the defendants (R. 2888). But the key to the situation is Leone's uncontradicted testimony that Twohig obtained from Gordon only self-serving declarations (R. 2888). The Government has never denied this. Twohig, of course, did not take the stand to refute it. Even in this Court, the Government claims no more than that the agents *questioned* Gordon before the tainted evidence was produced, not that they had any *evidence* of the falsity of the item prior to the violation of the defendants' constitutional rights.

2. The Government contends that an affidavit filed by Leone in 1954, in opposition to petitioners' pre-trial motion to dismiss the indictment and to suppress evidence, contradicts his present position. Even if a flat contradiction existed, the question of whether Leone was telling the truth in 1954, or is telling the truth now, obviously cannot be determined by merely comparing his statement then with his testimony now, which is what the Government has done here (Br., pp. 12-13). The Government's failure to cross examine Leone below on this, or any other issue, would indicate that his testimony on the present hearing was completely truthful.

Furthermore, there was no contradiction whatever between Leone's 1954 affidavit and his testimony on the present application. In his 1954 affidavit, Leone stated that before the 1953 indictment was obtained, he and the Treasury agents went over every charge and all the proof and that he knew of no evidence presented to the 1953 grand jury which was obtained in any way, however remote, from defendants' testimony or production of partnership documents to the grand jury. The Government argues

that since Leone stated that no tainted evidence was presented to the 1953 grand jury, and since Tavern's closing inventory and the research expense constituted the only fraud involved in Count Two of the indictment, that Leone's 1954 affidavit must necessarily conflict with his present contention.

The argument has several obvious flaws. Even if no tainted evidence was presented to the 1953 grand jury, as Leone's 1954 affidavit suggests, that fact does not impugn, in the slightest, his present disclosure that the Government's first knowledge of two vital aspects of the prosecution emanated from tainted sources. The Government's first knowledge of any item of evidence has no inevitable relationship to the evidence subsequently presented to the grand jury.

The 1953 grand jury proceedings have not been revealed to the court or to counsel for the defendants. Whether or not tainted evidence was used there cannot be determined on this record. The indictment may have been obtained with untainted evidence, it may have been obtained by the use of tainted evidence, or it may have been obtained without any legal evidence at all. Cf. *Costello* v. *United States*, 350 U. S. 359. There is no basis for assuming here that the evidence presented to the 1953 grand jury, regarding the Tavern return, was the same as the evidence which the Government employed against the defendants at the trial, or that the source thereof was identical in both instances. What we are concerned with here is the use of tainted evidence at the trial, not before the grand jury.

The fact that the indictment may have been obtained without the use of tainted evidence does not preclude the possibility that such evidence infected the trial.

3. Leone's oral testimony did not contradict the affidavit which he submitted in support of the application, as the Government contends.

The accuracy of our extensive summary of the contents of Leone's affidavit and his testimony (Br., pp. 10-11, 13-17) has not been challenged in the slightest by the Government. Instead, two statements of Leone's are emphasized. In one, Leone testified that the Government had knowledge of the closing inventory and, in the other, that the Government had knowledge of the research expenditures. This knowledge, as we have demonstrated above, is utterly immaterial. No one disputes that the Government had knowledge of the research expense claimed by Tavern. Indeed, the deduction appeared on the face of its tax return. The point is that when the agents questioned Gordon about the deduction (before the tainted evidence was obtained), they got self-serving answers, whereas, after the tainted evidence was obtained, the Government, as Leone stated, had its first *knowledge*, as distinguished from suspicion, of the falsity of the deduction (R. 2881-5).

Similarly, with respect to the Tavern inventory, the agents knew of its existence but not until the tainted evidence was obtained did they have evidence of the fact that it figured in a false income tax return.

The Government's cavalier treatment (Br., pp. 14-15) of the authorities relied upon by petitioners reveals the basic weakness of its position. We have already noted the significant failure to comment upon *Price* v. *Johnston*, *supra*. Equally notable is the failure to discuss *Holiday* v. *Johnston*, 313 U. S. 342, which is relied upon in petitioners' main brief (p. 32). In no sense can these cases, or the many others cited by petitioners, be dismissed with the curt notation that they are "not apposite here." If, in truth, they were not apposite here, the Government would have furnished the details. Having failed to do so, we are entitled to conclude that these authorities are determinative of the issues raised here.

Conclusion

The petitioners were clearly entitled to a plenary hearing below on the basis of an affidavit, by a former prosecutor, which has been described by the Government here (Br., pp. 2-3) as indicating that tainted evidence was used against them at the trial. They were denied such a hearing in disregard of the plain mandate of Title 28 U.S.C. § 2255. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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